UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOUGLAS COLVIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:00 CV 1157 CEJ
	)	DDN
LYNDA TAYLOR,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the court upon the petition of Missouri state prisoner Douglas Colvin for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition in accordance with 28 U.S.C. § 636(b). Petitioner claims that his guilty plea was involuntary because at sentencing the State failed to honor its promise to stand silent.

Petitioner was charged in the Circuit Court of Randolph County with two counts of distributing a controlled substance in April 1997, and one count of maintaining a public nuisance from January through April 1977 by using his place of residence for selling drugs. He pled guilty to all charges. At the plea hearing, the prosecutor described the State's evidence and noted that for a persistent offender, the sentencing range was five to thirty years imprisonment for the distribution counts, and one to twenty years on the nuisance count. The prosecutor explained that the parties had an understanding that petitioner would most likely request sentencing to an institutional treatment center for 120 days, followed by probation, pursuant to Mo. Rev. Stat. § 559.115, and that the State "agreed to stand silent upon that request." Resp. Ex. 1 at 11-12.

At sentencing, when discussing petitioner's presentence investigation report, defense counsel acknowledged petitioner's 1984 conviction for first-degree robbery when petitioner was 27 years old. Counsel maintained that petitioner had matured a lot since then and had made good use of his time in prison for that crime by taking classes to help him succeed on the outside without being a danger to society. Id. at 20. After a brief discussion on the range of punishment, the prosecutor stated as follows:

> Your honor, I've agreed to stand silent today, but I was listening while we were arguing about the PSI. And I do have a bit of a problem with some remarks [that] were made. Which is that the defendant has matured a lot in his thirteen years at the Department of Corrections, and made good use of his time, and has been able to succeed without being a danger to society.
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> Within a matter of -- I mean this guy just got out of prison. And right after he got out of prison, he engaged in a drug operation which involved, in part, 801 West Coates, but also involved other activities that were going on. There are complete connections between him and other members of the St. Louis area.
>
> When this whole program of selling started, through January and April, and we started making our buys, Mr. Colvin immediately jumped into the fray, and started dealing drugs right away. Even the day that he was picked up on this offense, he made a buy -- or he made a sale to our confidential informant before they tapped him that day. We even recovered the buy money off of him.
>
> I don't think it can be said that he matured a lot, or made the most of his time. The only thing I'd add to that is the fact that apparently he didn't take his treatment program too seriously. On one of the last pages there, it says he completed out-patient treatment, a special condition of his parole, at Archways Communities, Inc., in 1994. But by his own admission, he continued to use drugs.
>
> * * *

> . . . [H]e wasn't out [of prison for the first-degree robbery] any time before the buys were being made in this case.
>
> And I think that is a relevant factor for the Court to consider, in light of the comments defense counsel makes about his rehabilitation.

Id. at 21.

It was agreed that, if petitioner was not sentenced as a persistent offender, the sentencing range on the distribution counts would be five to fifteen years, and up to seven years on the nuisance count. Id. at 20-21. Defense counsel stated that, if petitioner was sentenced to probation "with a term of shock time," his employer would have a job waiting for him for six months, and he could finish his associate degree and support his 15-year old daughter. Alternatively, defense counsel requested a sentence of five years imprisonment. Id. at 22-23. The prosecutor then spoke on the issue of whether petitioner was part of a conspiracy to distribute drugs, and described evidence the State had that he was. Id. at 23. The court did not sentence petitioner as a persistent offender, but sentenced him to two concurrent terms of eight years imprisonment on the distribution counts, and to a consecutive term of five years imprisonment on the nuisance count. Id. at 24.

Petitioner filed a timely motion under Missouri Supreme Court Rule 24.035, seeking to withdraw his guilty plea on the ground that the State had violated its plea agreement to stand silent at sentencing with regard to petitioner's request for sentencing under § 559.115. Following an evidentiary hearing, the trial court concluded that the remarks by the prosecutor at sentencing "were fair comments upon what defense counsel had stated," and that the State "had a duty to the Court to rebut inferences drawn by defense counsel which the prosecutor believed to be unfair or untrue inferences." Resp. Ex. 3, Appendix at A-4. The court observed that "the prosecutor did not suggest a particular sentence, nor did

he voice opposition to probation." Id. The court thus concluded that the State did not violate its agreement to stand silent on the § 559.115 issue, and denied petitioner's motion for postconviction relief. Id.

The Missouri Court of Appeals affirmed the denial, holding that the State fulfilled its promise to stand silent to petitioner's request for a sentence to an institutional treatment center with a 120-day call back. The court noted that the prosecutor's "comments in reply to defense counsel's characterizations of [petitioner] as matured and rehabilitated were mere clarifications of fact before the sentencing court." Colvin v. Missouri, No. WD 57363 (Mo. Ct. App. Feb 15, 2000); Resp. Ex. 5 at 4.[1] Petitioner then commenced the present action, again raising the claim that the State breached its plea agreement in violation of his constitutional rights.

The State argues that petitioner's claim is not exhausted, and thus not reviewable by this court, because he did not ultimately present it to the Missouri Supreme Court. The State relies upon O'Sullivan v. Boerckel, 526 U.S. 838 (1999), in which the United States Supreme Court held that to exhaust state remedies, a state prisoner must seek the discretionary review of the state supreme court when that review is part of the ordinary and established appellate review process in that state. Id. at 845, 847.

The State's argument is foreclosed by the Eighth Circuit's recent opinion in Dixon v. Dormire, 263 F.3d 774 (8th Cir. 2001). The court there first held that under O'Sullivan, Missouri prisoners are required to seek a transfer for discretionary review by the Supreme Court of Missouri before seeking federal habeas review. Nevertheless, the court held that this rule was not to be

[1]The Missouri Court of Appeals issued a summary opinion accompanied by a Memorandum of Reasons, pursuant to Missouri Supreme Court Rule 84.16(b). Resp. Ex. 5.

applied to Missouri prisoners, such as petitioner here, who bypassed the opportunity to apply for discretionary review before O'Sullivan was decided in reliance on the State's prior and consistent position that the failure to seek such review would not be asserted as a defense to a federal habeas action. Id. at 781. Therefore, petitioner is not foreclosed from seeking federal habeas relief as the State argues.

To be entitled to habeas relief, petitioner must show that the Missouri courts' adjudication of his federal constitutional claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule from the Supreme Court's cases "but unreasonably applies it to the facts of the particular state prisoner's case." Williams v. Taylor, 529 U.S. 362, 407-08 (2000) (plurality opinion). The "unreasonable application" inquiry is an objective one. Id. at 409-10. "An unreasonable application of federal law is different from an incorrect application of federal law." Id. Thus, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established law erroneously or incorrectly. Rather that application must also be unreasonable." Id. at 411. See also Penry v. Johnson, 121 S. Ct. 1910, 1918 (2001); Carter v. Bowersox, No. 00-2777WM, 2001 WL 1033610, *6 (8th. Cir. Sept. 11, 2001).

The standards controlling adherence to a plea agreement were set forth by the Supreme Court in Santobello v. New York, 404 U.S. 257 (1971). In Santobello, in exchange for the defendant's plea of guilty, the prosecutor agreed to make no sentencing recommendation. At sentencing, however, a new prosecutor (apparently ignorant of the first prosecutor's promise) recommended the maximum one-year sentence. Defense counsel objected to this recommendation and sought an adjournment. The sentencing judge denied that request and stated that he was not at all influenced by the prosecutor's recommendation. The court then imposed the maximum one-year, recommended term. On appeal, the conviction was affirmed. The Supreme Court vacated the judgment and remanded the case. The Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. at 262. The inadvertence of the breach, the Court held, did not "lessen its impact" and, even absent prejudice at sentencing, "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration." Id. at 262-63.

Thus, in Santobello, the Supreme Court clearly established that a prosecutor who enters into a plea agreement must fulfill the promises contained therein. Under the limited review permitted by 28 U.S.C. § 2254(d), this court must decide whether the prosecutor breached the plea agreement and whether the state courts' adjudication to the contrary was an unreasonable application of Santobello. The court answers each of these questions in the affirmative.

The undersigned agrees with the state courts with regard to the parameters of the State's agreement to stand silent. The State

did not agree to stand silent at the sentencing hearing in general. The State was free to comment, for example, on the PSI, on petitioner's status as a persistent offender, and on the details of the charged crimes. The State, however, was to be silent with regard to petitioner's request for a sentence of probation pursuant to § 559.115. The undersigned believes that the state courts' decisions that the State did not really say anything in opposition to petitioner's request for probation was an unreasonable application of Santobello. The prosecutor himself realized he was breaking his promise by beginning with, "Your honor, I've agreed to stand silent today, but . . . ." See Gunn v. Ignacio, 263 F.3d 965, 971 (9th Cir. 2001) (state court's decision that prosecutor did not breach plea agreement not to oppose two concurrent sentences was an unreasonable determination of the facts thereby warranting federal habeas relief); Dunn v. Colleran, 247 F.3d 450, 458-59 (3rd Cir. 2001) (state court's decision that prosecutor did not violate plea agreement to recommend the agreed-upon minimum sentence of 36-60 months by asking for a "lengthy" sentence was an unreasonable application of Santobello).

The appropriate remedy is to remand this case to the Circuit Court of Randolph County to decide whether petitioner should be resentenced by a new judge, or be allowed to withdraw his guilty plea. See Santobello, 404 U.S. at 263; Dunn, 747 F.3d at 461-62.

For these reasons,

IT IS HEREBY RECOMMENDED that the petition of Douglas Colvin for a writ of habeas corpus be granted and that the action be remanded to the Circuit Court of Randolph County, Missouri, to decide whether petitioner should be resentenced by a new judge, or allowed to withdraw his guilty plea.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to timely file written objections may result in the waiver of the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of October, 2001.